IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

KERI MCELMURRY AND KAREN MRAZEK INDIVIDUALLY, and on Behalf of All Similarly Situated Plaintiffs, v. US BANK NATIONAL ASSOCIATION, AND ITS AFFILIATES AND SUB-SIDIARIES, DOES 1-25, Defendants.	No. CV-04-642-HU FINDINGS & RECOMMENDATION

J. Dana Pinney
A.E. Bud Bailey
David Schuck
BAILEY, PINNEY & ASSOCIATES, LLC
18765 S.W. Boones Ferry Rd., Suite 125
Tualatin, Oregon 97062-8438

Attorneys for Plaintiffs

Carol J. Bernick
Christopher F. McCracken
Kevin H. Kono
Jennifer A. Nelson
DAVIS WRIGHT TREMAINE, LLP
1300 S.W. Fifth Avenue, Suite 2300
Portland, Oregon 97201

Attorneys for Defendants

HUBEL, Magistrate Judge:

Plaintiffs Keri McElmurry and Karen Mrazek bring this Fair Labor Standards Action on behalf of all similarly situated plaintiffs and against US Bank National Association and its affiliates and subsidiaries and Does 1-25. Plaintiffs seek to bring this case as a collective action under 29 U.S.C. § 216(b).

Plaintiffs bring four claims for relief: (1) a claim on behalf of sales and service managers (SSMs) that they were improperly classified as exempt employees and thus, defendant has failed to pay these plaintiffs 1½ times their regular rate of pay for any hours worked over forty in a week; (2) a claim challenging defendant's alleged "rounding down" policy. This claim contends that non-exempt hourly employees are instructed to round their hours worked to the closest tenth of an hour which, plaintiffs allege, results in employees under-reporting their actual hours worked. Claim two alleges that the rounding down has resulted in a lack of overtime being paid to some employees ("Rounding OT" claim); (3) Claim three is a similar challenge to the rounding down policy, but contends that the rounding down has resulted in some employees being paid less than the federal minimum wage ("Rounding MW" claim); and (4) a supplemental state claim which contends that defendant has failed to timely pay wages owing upon an employee's termination. Plaintiffs allege that the three FLSA claims are willful violations.

Presently, defendant moves to (1) dismiss the second, third, and fourth claims, or alternatively to stay those claims; (2) dismiss the affiliates and subsidiaries and the Does 1-25; (3) make ¶ 29a of the Complaint more definite and certain; (4) strike ¶ 22

of the Complaint; and (5) strike plaintiffs' claim for prejudgment interest.

Plaintiffs move for an order that notice be sent to the putative opt-in collective action members. Plaintiffs also move for an order allowing the equitable tolling of the statute of limitations for all putative class members during the pendency of the notice process. Defendant moves to strike portions of the declarations that plaintiffs submitted in support of plaintiffs' motion.

I recommend that defendants' Rule 12 motions be granted in part and denied in part, that plaintiffs' motion for notice be denied, and that defendant's motions to strike be denied as moot.

I. Defendant's Rule 12 Motions

A. Rule 12(b)(6) Standards

On a motion to dismiss, the court must review the sufficiency of the complaint. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). The court should construe the complaint most favorably to the pleader:

> In evaluating the sufficiency of the complaint, we follow, of course, the accepted rule that the complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Conley v. Gibson, 355 U.S. 41, 45-46 (1957); American Family Ass'n, Inc. v. City & County of San Francisco, 277 F.3d 1114, 1120 (9th Cir. 2002). The allegations of material fact must be taken as true. Moyo v. Gomez, 40 F.3d 982, 984 (9th Cir. 1994).

B. Discussion of Rule 12(b)(6) Motion

Defendant argues that the Complaint fails to state a claim as

to the rounding policy because it fails to allege that McElmurry or Mrazek were actually subject to the policy or that they were ever injured by the policy. Defendant contends that even with liberal notice pleading standards, plaintiffs fail to allege the basic facts to support their rounding policy claims, both as to overtime and minimum wage. Defendant asserts that the Complaint is devoid of any factual allegations that the rounding policy was ever applied to either named plaintiff, that any such rounding policy caused either named plaintiff to work overtime for which she was not paid, that any rounding policy caused either named plaintiff's wages to drop below the federal minimum wage, and that any alleged rounding violated the law.

In response, plaintiffs point to paragraphs 29, 42, 43, 44, and 45 of the Complaint to support their position that they adequately state a claim. I agree with plaintiffs. In addition to the paragraphs plaintiffs cite, I find that paragraphs 18, 22, 29b, 39, and 50 provide additional facts in support of both of the rounding claims. Read together, the facts alleged in these paragraphs sufficiently state that the named plaintiffs have rounding claims under the federal notice pleading standard.

I note, however, that because I grant other parts of defendant's motion and plaintiffs will therefore be submitting an amended complaint, plaintiffs may well want to make the allegations of these rounding claims more definite and certain by actually specifying (1) which named plaintiff brings which particular claim; (2) that the rounding policy applied to each named plaintiff or which one if only one; and (3) that each named plaintiff (or which one) was injured by the policy and in which way - overtime, minimum

wage, or both.

And, as to the rounding minimum wage claim, in light of the facts put forth by defendant during oral argument on this motion that one of the plaintiffs earned substantially more per hour than minimum wage and thus, could not possibly assert a minimum wage violation claim even if she proves a claim showing she was not paid for certain time as a result of the rounding policy, plaintiffs must, as always, assure themselves and their counsel that they have a good faith basis for asserting this claim. Plaintiffs may want to include express allegations as to which named plaintiff, or both, earned an hourly wage such that the rounding policy created an effective hourly rate below the applicable minimum wage for the named plaintiff(s).

C. Dismissal of the Late Pay/Termination Claim

This claim seeks penalties for the alleged late payment of wages upon termination. The Complaint refers to Oregon Revised Statute § (O.R.S.) 652.140 and a California statute. Compl. at ¶¶ 56, 63. It also refers to any other "state's statute requiring timely payment of final wages." Id. at ¶ 63. Defendant articulates two bases for dismissing this claim: (1) lack of supplemental jurisdiction; and (2) dismissal to the extent it asserts claims under late pay statutes of states other than Oregon.

1. Supplemental Jurisdiction

Defendant makes two arguments in support of its position that taking supplemental jurisdiction over the late pay/termination claim is inappropriate in this case. Defendant contends first that the late pay/termination claim does not share a common nucleus of operative facts with the other claims and second, that there are

exceptional circumstances which offer compelling reasons to decline supplemental jurisdiction.

a. Common Nucleus of Operative Facts

Federal courts have supplemental jurisdiction over state law claims that "form part of the same case or controversy under Article III of the United States Constitution" as claims over which the court has original jurisdiction. 28 U.S.C. § 1367. Claims form part of the same case or controversy if they arise from a common nucleus of facts and if they would normally be tried together. Bahrampour v. R.O. Lampert, 356 F.3d 969, 978 (9th Cir. 2004).

However, claims do not necessarily share a common nucleus of facts merely because they arise from an employer-employee relationship. Lyon v. Whisman, 45 F.3d 758, 762-63 (3d Cir. 1995) (rejecting supplemental jurisdiction in an FLSA case because "there is so little overlap between the evidence relevant to the FLSA claims" and the state contract and tort claims and noting that the FLSA claim involved "very narrow, well-defined factual issues about hours worked during particular weeks.").

Defendant argues that there is no common nucleus of operative facts between the FLSA SSM and rounding claims on the one hand, and the state late pay/termination claim on the other. The FLSA claims, defendant notes, relate to alleged violations during the employment relationship and require proof regarding hours worked and wages paid during each particular work week at issue. The SSM claim will require plaintiffs to present evidence about the duties of SSMs at various banks. The rounding claims will require proof that defendant wrongfully required employees to round their time

and that this alleged rounding resulted in overtime and minimum wage violations. Thus, the focus of these claims is on what duties employees had while they were employed and their payroll records while they were employed.

In contrast, the late pay/termination claim involves proof of events occurring at or after the end of the employment relationship. Relevant evidence includes the factual circumstances of the termination of the employment relationship and then what wages were due and owing at the end of the relationship, and when they were paid.

Defendant argues that due to the factual distinctions between the FLSA claims and the late pay/termination claim, there is no overlap between the evidence required to prove plaintiffs' FLSA claims and the evidence required to prove the state law claims. They are wholly dissimilar.

While defendant raises a valid point about the relationship between the FLSA claims and the "traditional" late pay/termination claim in which there is no dispute about what final wages are owed, but simply a delay in paying them, plaintiffs' late pay/termination claim is broader than this "traditional" type of late pay/termination claim. As plaintiffs explain, while some penalties may be owing by a straightforward late payment of undisputed wages, an additional basis for the late pay/termination claim is grounded in the rounding and SSM claims. That is, to the extent a plaintiff is owed wages because of a well-founded SSM or rounding claim (either overtime or minimum wage), then any such wages would not have been paid upon termination and thus, additional penalties for the late payment of such wages should be forthcoming under Oregon,

and other states', laws.

I agree with plaintiffs that to the extent the late pay/termination claim plaintiff(s) also have an SSM or rounding claim, there is some overlap of facts providing for a common nucleus of operative fact. If an SSM or rounding plaintiff is successful in proving an FLSA violation, the late pay issue arises out of the same nucleus of operative fact if that plaintiff has been terminated. This is sufficient for the exercise of supplemental jurisdiction.

b. Exceptional Circumstances

The court may decline to exercise supplemental jurisdiction where, "in exceptional circumstances, there are . . . compelling reasons" for doing so. 28 U.S.C. § 1367(c)(4). "Compelling reasons" include "those that lead a court to conclude that declining jurisdiction best accommodate[s] the values of economy, convenience, fairness, and comity." Executive Software N. Am., Inc. V. United States Dist. Ct. For the Central Dist. Of Calif., 24 F.3d 1545, 1557 (9th Cir. 1994) (internal quotation omitted). A "pending state court action probably constitutes 'exceptional circumstances.'" Polaris Pool Sys. V. Letro Prods., Inc., 161 F.R.D. 422, 425 (C.D. Cal. 1995). Defendant contends that because there are two pending state court cases raising the rounding and late pay/termination claims, I should decline to exercise supplemental jurisdiction.

I do not find that these two pending cases qualify as an "exceptional circumstance" to support declining the exercise of supplemental jurisdiction. Unlike in Polaris Pool Systems, where the state court action involved the same parties as the federal

court action, neither of the named plaintiffs in the instant case is a plaintiff in the state court cases. While a class action motion has been filed and argued in one of those cases, there has been no resolution of the motion as of yet. No class action motion has been filed in the other case. Given this distinction, I do not accept defendant's argument that exceptional circumstances to defeat supplemental jurisdiction are present.

2. Late Pay/Termination Claims Under Other State Laws

Next, defendant argues that the late pay/termination claim should be dismissed to the extent plaintiffs seek recovery under late pay/termination statutes other than Oregon's. I agree with defendant. As discussed below, I recommend that plaintiffs' motion for notice to the putative class be denied. As such, the case remains brought by the two named plaintiffs, only one of which has a late pay/termination claim. That plaintiff, Mrazek, brings her claim under Oregon law. Based on the facts alleged in the Complaint, she has no standing to assert a late pay/termination claim for relief under any other state's late pay/termination statute. I recommend that this motion be granted.

D. Dismissal/Abstention of Rounding and Late/Pay Termination Claims Under Colorado River.

Defendants move to dismiss or abstain the rounding and late pay/termination claims because class actions encompassing what defendant calls identical claims, are pending in state court. There are two cases in Multnomah County Circuit Court which raise the claims brought in this case. In Rivera v. U.S. Bank National Association, Mult. Co. Case No. 0305-05045, the plaintiffs challenge the same rounding policy, both as to its effects on

overtime and minimum wages, as they challenge in this action. The claim in Rivera is brought under Oregon law, however, not the FLSA. The Rivera plaintiffs also bring a state law late pay/termination claim like the one pending here.

In Belknap v. U.S. Bank National Association, Mult. Co. Case No. 0301-00042, the plaintiffs assert a state late pay/termination claim like the one pending here. Both Rivera and Belknap have been filed as class actions under Oregon Rule of Civil Procedure 32. A class action certification motion has been filed and argued in Belknap, but no decision on that motion has been issued. No such motion has been filed in Rivera although defendant represents, and plaintiffs have not disputed, that the Rivera plaintiffs plan to file such a motion in the future.

Defendant argues that this case should be dismissed or stayed in light of Rivera and Belknap. As defendant notes, both of those cases were filed before this case. Defendant argues that while the rounding claims in Rivera are based on state rather than federal law, neither law is controlling and both Rivera and this case are based on the identical factual predicate.

Defendant further notes that while this case is filed as a nationwide collective action, the only plaintiffs are Oregon residents and thus, relief under Oregon state law as a class member in Rivera and Belknap would fully compensate plaintiffs. Moreover, defendant notes, plaintiff Mrazek is actively participating in Belknap by filing a declaration in support of the class certification motion pending in that case. Thus, defendant argues, plaintiffs would be fully protected if I defer to the currently pending state actions and such deference would avoid piecemeal

adjudication of "identical" claims.

Finally, defendant argues, dismissing or staying the claims in this case will discourage what defendant calls plaintiff's blatant attempt at forum shopping.

In response, plaintiff notes that concurrent actions in a state court are "no bar to proceedings concerning the same matter in the Federal court having jurisdiction." Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 820 (1976). There is a "heavy obligation" on federal district courts to exercise jurisdiction given them under the Constitution and laws of the United States. Id. at 818, 820.

"District courts have an obligation and a duty to decide cases properly before them, and '[a]bstention from the exercise of federal jurisdiction is the exception, not the rule.'" City of Tucson v. U.S. West Communications, Inc., 284 F.3d 1128, 1132 (2002) (quoting Colorado River, 424 U.S. at 813). As explained in a 2002 case:

> Under Colorado River, considerations of "wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation," Colorado River, 424 U.S. at 817, 96 S. Ct. 1236, may justify a decision by the district court to stay federal proceedings pending the resolution of concurrent state court proceedings involving the same matter, Intel Corp. v. Advanced Micro Devices, Inc., 12 F.3d 908, 912 (9th Cir. 1993). "[E]xact parallelism" is not required; "[i]t is enough if the two proceedings are 'substantially similar.'" Nakash v. Marciano, 882 F.2d 1411, 1416 (9th Cir.1989) (citations omitted).
>
> But because "[g]enerally, as between state and federal courts [with concurrent jurisdiction], the rule is that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction[,]" the Colorado River doctrine is a narrow exception to "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." Colorado River, 424 U.S. at

> 817, 96 S. Ct. 1236 (internal citation and quotation marks omitted); accord Intel, 12 F.3d at 912. In Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983), the Supreme Court clarified that to fit into this narrow doctrine, "exceptional circumstances" must be present. 450 U.S. at 15-16, 101 S. Ct. 836; see also Colorado River, 424 U.S. at 818, 96 S. Ct. 1236 ("Given [the federal court's obligation to exercise jurisdiction], and the absence of weightier considerations of constitutional adjudication and state-federal relations, the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention. The former circumstances, though exceptional, do nevertheless exist.").

Holder v. Holder, 305 F.3d 854, 868-69 (9th Cir. 2002).

Additionally,

> When a district court decides to dismiss or stay under Colorado River, it presumably concludes that the parallel state-court litigation will be an adequate vehicle for the complete and prompt resolution of the issues between the parties. If there is any substantial doubt as to this, it would be a serious abuse of discretion to grant the stay or dismissal at all. . . . Thus, the decision to invoke Colorado River necessarily contemplates that the federal court will have nothing further to do in resolving any substantive part of the case, whether it stays or dismisses.

Intel, 12 F.3d at 913 (internal quotation omitted).

Several factors are relevant to the Colorado River determination. First, however, is the dispositive factor of whether the state court judgment will resolve all of the issues before the federal court. Holder, 305 F.3d at 870; Intel, 12 F.3d at 913. The remaining non-exclusive factors are:

(1) whether the state court first assumed jurisdiction over property;

(2) inconvenience of the federal forum;

(3) the desirability of avoiding piecemeal litigation;

(4) the order in which jurisdiction was obtained by the

concurrent forums;

(5) whether federal law or state law provides the rule of decision on the merits;

(6) whether the state court proceedings are inadequate to protect the federal litigant's rights; and

(7) whether exercising jurisdiction would promote forum shopping. Holder, 305 F.3d at 870.

"The factors relevant to a given case are subjected to a flexible balancing test, in which one factor may be accorded substantially more weight than another depending on the circumstances of the case, and with the balance heavily weighted in favor of the exercise of jurisdiction." Id. at 870-71 (internal quotation omitted).

The resolution of this particular motion turns on the dispositive factor. First, as noted previously, neither of the plaintiffs in this case is a plaintiff in Rivera or Belknap. Thus, unless one or both of those cases is certified as a class action, a judgment in either of those cases will not resolve the claims brought by these plaintiffs in the instant case.

Second, the rounding claim in Rivera is brought under state law. It was undisputed at oral argument that while a plaintiff may not recover the actual unpaid wages more than once (e.g. recovery of the wages themselves would be under either state or federal law with no double recovery), the penalties imposed for the non-payment of any overtime or minimum wages owing are different under the two statutes. Thus, even if the plaintiffs in this case became members of a class action that is ultimately certified in Rivera, a judgment in Rivera would not resolve all of the issues pending in

this case.

Furthermore, in examining the remaining factors, even though the similar claims were filed first in state court, the federal forum is not inconvenient, neither federal nor state law is controlling as to the rounding claims, given the different plaintiffs, the litigation is not particularly "piecemeal," and, as noted, the state court litigation does not completely protect plaintiffs' rights, at least as far as the penalties are concerned.

Finally, while defendant suggests that forum shopping motivated plaintiff to file the instant case after dismissing a similar case in state court, I decline to make any findings regarding this accusation on the present record. Any such finding would not outweigh the other factors discussed above. Accordingly, I recommend that defendant's Colorado River dismissal/abstention motion be denied.

E. Dismissal of Doe Defendants

As indicated above, plaintiffs bring this case against US Bank National Association and its affiliates and subsidiaries and Does 1-25. Defendant argues that the defendants "Affiliates and Subsidiaries, Does 1-25" should be dismissed because plaintiffs fail to state any claim against them. Plaintiffs' claims contain no allegation that either named plaintiff worked for any "affiliate or subsidiary" of US Bank National Association. Thus, defendant argues, plaintiffs have failed to plead any facts or allegations demonstrating that they are entitled to relief as against the "Doe" defendants.

Defendant also argues that the "Doe" defendants should be

dismissed because plaintiffs fail to plead that they made any effort to ascertain the "Doe" defendants' true identities. Defendant suggests that the use of a Doe or fictitiously named defendant is permissible only if the complaint alleges why the defendant's real name was not then known or ascertainable.

In response, plaintiffs state that they concede this motion and are willing to replead the "Does" section to include additional information regarding who the "Does" are and why they are included. They explain that they included defendants under the "Does" title because they believe defendant has operated, or is associated with, multiple corporations which are similarly situated to US Bank National Association.

Given plaintiffs' concession of the motion, I grant the motion. While plaintiffs may now have some idea of the names of additional defendants to substitute in place of the "Does," plaintiffs still do not know if any of them engaged in any wrongful conduct. Furthermore, it appears that neither of the named plaintiffs worked for any entity other than the named US Bank National Association. Given my recommendation to deny plaintiffs' notice motion, it makes sense to dismiss the Doe defendants at this point. Plaintiffs can file an amended complaint at a later time if they learn of facts supporting a good faith basis to allege a claim against a named subsidiary or affiliate.

F. Paragraph 29a

Paragraph 29a of the Complaint states that: "[a]t least one of the named Plaintiffs is a member of each collective claim." Compl. at ¶ 29a. Defendant moves to make this paragraph more definite and certain under Federal Rule of Civil Procedure 12(e)

because it fails to indicate which named plaintiff is a member of which collective action claim. Plaintiff concedes this motion and has agreed to amend the paragraph. Based on plaintiffs' concession, I recommend that the motion be granted.

G. Paragraph 22

Defendant moves to strike paragraph 22 of the Complaint which provides that "[a]t all relevant times, and within the preceding 6 years, US BANK allowed, suffered and permitted Plaintiffs and other employees to perform work for which they were not compensated." Id. at ¶ 22. Defendant notes that the statute of limitations is two years, or three years for willful violations, making anything more than three years irrelevant. Plaintiffs concede this error and state they will replead the paragraph to limit it to the relevant three-year period. I recommend that the motion be granted.

H. Prejudgment Interest

Defendant moves to strike plaintiffs' claim for prejudgment interest because, defendant contends, plaintiffs are not entitled to prejudgment interest. Ninth Circuit law suggests that if plaintiffs prevail on their allegation that defendant acted willfully and thus obtain liquidated damages, plaintiffs cannot also recover prejudgment interest. Brock v. Shirk, 833 F.2d 1326, 1331 n.3 (9th Cir. 1987) (rejecting prejudgment interest where liquidated damages were awarded because "[o]nly one such 'make whole' remedy is proper"), vacated on other grounds, 488 U.S. 806 (1988).

But, the law also provides that in the absence of a liquidated damages award, prejudgment interest is necessary to fully

compensate employees for tho losses they have suffered. Ford v. Alfaro, 785 F.2d 835, 842 (9th Cir. 1986) (noting that it would be an abuse of discretion not to include prejudgment interest in backpay awards under the FLSA).

Based on these precedents, it would seem reasonable to grant defendant's motion to the extent that plaintiffs should replead the prejudgment interest claim as an alternative remedy to their claim for liquidated damages. This is especially so given that plaintiffs will be submitting an amended complaint in any event.

However, at oral argument, plaintiffs contended that the law is not clearly established that prejudgment interest and liquidated damages remedies are exclusive of each other in an FLSA case. They requested the opportunity to make a legal argument, at a later stage in the case, in support of their position that they are entitled to both remedies. Given that the prejudgment interest claim along with the liquidated damages claim, as they are presently pleaded, do not prejudice defendant, and given plaintiffs' request to brief this issue in-depth at a later date, I recommend that this motion be denied at this point. The issue should be addressed later through motion or in the pretrial order.

In summary, as to defendant's Rule 12 motions, I recommend that (1) the motion to dismiss for failure to state a claim directed at the rounding claims be denied; (2) the motion to dismiss the late pay/termination claim be denied in part and granted to the extent that it is directed to claims based on non-Oregon statutes; (3) the motion to dismiss or abstain the rounding and late pay/termination claims based on Colorado River be denied; (4) the motion dismissing the Doe defendants be granted; (5) the

motion to make paragraph 29a more definite and certain be granted; (6) the motion to strike paragraph 22 be granted; and (7) the motion to strike the prejudgment interest claim be denied.

II. Plaintiffs' Notice Motion

A. Standards for Collective Actions

The FLSA provides, in pertinent part:

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

29 U.S.C. § 216(b) (emphasis added).

As noted by the Ninth Circuit, the "FLSA authorizes an employee to bring an action on behalf of similarly situated employees, but requires that each employee opt-in to the suit by filing a consent to sue with the district court. See 29 U.S.C. § 216(b)."[1] Does I Thru XXIII v. Advanced Textile Corp., 214 F.3d 1058, 1064 (9th Cir. 2000). "To facilitate this process, a

[1] Unlike class actions certified under Federal Rule of Civil Procedure 23, an individual may become a party plaintiff in an FLSA collective action only if he or she files a "consent in writing," i.e., "opts-in." 29 U.S.C. § 216(b).

district court may authorize the named plaintiffs in an FLSA collective action to send notice to all potential plaintiffs, see Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 169, 110 S. Ct. 482, 107 L. Ed. 2d 480 (1989), and may set a deadline for plaintiffs to join the suit by filing consents to sue, id. at 172, 110 S.Ct. 482." Id. Thus, here, plaintiffs file this "Hoffman-LaRoche" motion to authorize notice to be sent to all potential plaintiffs.

"In determining whether or not to certify a collective action, the core inquiry is whether the putative class members are 'similarly situated.'" Sheffield v. Orius Corp., 211 F.R.D. 411, 413 (D. Or. 2002). As further explained in Sheffield:

> This court considers the term 'similarly situated' in light of the purposes and goals of a collective action. The Supreme Court has recognized that class actions can be an efficient mechanism for resolving a number of disputes in one consolidated action. See Hoffman-La Roche, 493 U.S. at 170, 110 S. Ct. 482; see also Daggett [v. Blind Enterprises of Or.], 1996 U.S. Dist. LEXIS 22465, at *17 [D. Or. 1996]. However, an action dominated by issues particular to individual plaintiffs can not be administered efficiently because individual issues predominate over collective concerns.
>
> Putative class members must share more than a common allegation that they were denied overtime or paid below the minimum wage. The class members must put forth a common legal theory upon which each member is entitled to relief.

Sheffield, 211 F.R.D. at 413.

The 'similarly situated' standard is less stringent than the requirement under Rule 23(b)(3) that common questions of law or fact predominate over questions affecting only individual members. Ballaris v. Wacker Siltronic Corp., No. 00-1627-KI, 2001 WL 1335809, at *2 (D. Or. Aug. 24, 2001). In fact, the Eleventh Circuit has held that the similarly situated requirement is more

flexible than the requirements of Rule 20 (joinder) and Rule 42 (severance). Grayson v. K Mart Corp., 79 F.3d 1086, 1096 (11th Cir. 1996).

Nonetheless, plaintiffs are required to show through admissible evidence a "reasonable basis" for their claim that the employer acted on a class-wide basis. Hargrove v. Sykes Enterprises, Inc., No. CV-00-11-HA, 1999 WL 1279651, at *3 (D. Or. June 30, 1999). Plaintiffs' claims "must contain questions of both law and fact which are common to all employees engaged in the same character of work." Id. (internal quotation omitted). The burden is on plaintiffs to show they are similarly situated. Id. Unsupported allegations of widespread violations are insufficient. Freeman v. Wal-Mart Stores, Inc., 256 F. Supp. 2d 941, 945 (W.D. Ark. 2003).

B. Discussion

Plaintiffs seek certification of a collective action under section 216(b). Compl. at ¶ 23. They allege that they bring these

> claims on their own behalf and on behalf of all employees who, in the three years prior to the filing of the complaint, worked weeks without receiving compensation equal to the minimum wage for all hours worked and/or worked hours in excess of 40 hours per week and who were not compensated 1½ times their regular hourly rate, and who have filed or will file in this Court consent to being a party Plaintiffs [sic]. (Hereafter "FLSA classes").

Id. at ¶ 23. They further allege that they are similarly situated to members of the FLSA classes and that US Bank acted in accordance with a uniform policy in performing the acts alleged to violate the FLSA. Id. at ¶ 24.

Plaintiffs contend that common questions of fact and law exist as to all FLSA collective action members and predominate over any

questions that affect only individual members. Id. at ¶ 28. They contend that the conduct at issue affected all current and former hourly employees and all current and former SSMs who work or have worked for US Bank in the United States. Id. They allege that the common questions include, but are not limited to:

(1) whether plaintiffs and FLSA collective action members are subject to the FLSA;

(2) whether US Bank had a policy of reducing the recorded hours worked by systematically rounding all time entries downward;

(3) whether US Bank suffered and permitted all Rounding OT FLSA members to perform work for more than 40 hours in a single week without compensating the employee at 1½ times their regular hourly rate for those hours worked;

(4) whether US Bank suffered and permitted Rounding MW FLSA members to perform work, for which it failed to pay all minimum wages due;

(5) whether SSMs worked hours in excess of 40 hours per week;

(6) whether US Bank paid SSMs at a rate of 1½ times their regular hourly rate for all hours worked over 40 hours per week;

(7) whether US Bank was required under the FLSA to pay all SSMs 1½ times their regular hourly rate for all hours worked in excess of 40 hours per week;

(8) whether SSMs fit into any exemptions under the FLSA from overtime requirements;

(9) whether US Bank failed to pay plaintiffs and similarly situated collective action members all wages after termination of their employment as required by their corresponding state wage and hour laws; and

(10) which remedies are available for the alleged violations. Id. at ¶¶ 31(a), (b).

In their reply brief, plaintiffs state that they do not seek to notice the putative SSM plaintiffs at this time and that they do not seek to separately notice the late pay/termination plaintiffs. Rather, they have narrowed their motion to notice of the Rounding OT Class and the Rounding MW Class. Thus, paragraphs (5) - (8) above are not considered here.

In support of notice to the rounding claims classes, plaintiffs rely on McElmurry's declaration in which she states that while working as a "vault manager," she was paid an hourly wage and her work time was tracked on a "weekly time report." McElmurry Declr. at ¶¶ 4, 5. Each time report covers a one-week period. Attached as Exhibit 1 to her declaration is a copy of the "weekly time report" she used. Id. at ¶ 5. The report contains a conversion chart instructing the employee how to convert minutes worked to tenths of an hour. Id. at ¶ 6. McElmurry contends that under this chart, all rounding was done in favor of US Bank. Id. at ¶ 7. She cites the workweek ending July 18, 2003, as an example of a week for which she was not paid for all of her time worked because of the rounding policy. Id. at ¶ 8. She contends this resulted in unpaid wages and unpaid overtime wages. Id.

Plaintiffs also rely on the declaration of non-plaintiff Nathan Bailey who states that he was an hourly employee and submitted weekly time reports. Bailey Declr. at ¶¶ 1, 2. He also contends that the conversion chart requires that all rounding be done in favor of US Bank. Id. at ¶ 4. He contends that in the week ending April 25, 2002, the rounding policy resulted in him not

being paid all of his wages. Id. at ¶ 5. He further contends that the policy caused defendant to fail to pay him the then prevailing minimum wage for all time worked as required by Washington wage and hour laws and the FLSA. Id. at ¶ 7.

Plaintiffs submit copies of weekly time reports of forty-eight[2] separate employees which show, according to plaintiffs, that defendant's rounding policy resulted in a failure to pay overtime wages. Exh. 1 to Shuck Affid. Plaintiffs state that these examples are current and past employees who worked for US Bank at ten separate locations in Oregon during a six-month period. They were produced by defendant in the Rivera case. Plaintiffs estimate, based on forty-nine employees (including the duplicate record), at ten locations, and based on the representation that defendant has 1,190 locations in the United States, that no less than 5,831 current and former employees have similar rounding claims to the named plaintiffs.

In their reply memorandum, plaintiffs set forth a definition of the class to be noticed as:

> All non-exempt employees who work or worked for US Bank National Association who within the three year period prior to the filing of plaintiffs' complaint, and recorded the hours they worked on a weekly time report which contains the rounding chart identical to those submitted by plaintiff McElmurry.

Pltfs' Reply Mem. at p. 12.

Plaintiffs argue that the allegations in the Complaint and in their supporting affidavits show that there was a uniform company-

---

[2] Plaintiffs indicate that the reports are of forty-nine separate employees, but in reply, plaintiffs do not dispute defendant's assertion that one of the forty-nine is a duplicate.

wide policy that violates the FLSA. They contend that plaintiffs and all the employees who choose to opt-in were all affected by the same rounding policy. Thus, they argue that their claims should be certified pursuant to section 216(b) as a collective action and notice should be sent to all opt-in plaintiffs.

Defendant raises a host of arguments in opposition. Defendant contends that plaintiff's motion is premature, is unsupported by adequate proof, that plaintiffs are not similarly situated, and that plaintiffs have not sufficiently specified the purported class to receive notice. Because I agree with defendant that plaintiffs have not met their burden to show they are similarly situated, I decline to address defendant's other arguments.

Defendant maintains a policy of requiring employees to round their time to the nearest tenth of an hour. Marcia Kakiuchi Declr. at ¶¶ 10, 16 and Exhs. 1-3 to Kakiuchi Declr. While plaintiffs have narrowed their notice request to only those putative class members who used the particular time sheet attached to McElmurry's declaration, it is undisputed that there were at least four different weekly time reports in use during the relevant time period. These versions have been available on-line to employees since 2001. Defendant does not know when each of the various forms was actually put on-line or off-line. Moreover, sometimes employees printed a particular version and continued to use it by making photocopies of it, even after defendant had replaced it with a different version, in contravention of defendant's instruction to use the current version.

Employees in approximately twenty states used these various weekly time reports. In approximately fifteen states, employees

used a different system which did not involve filling out a weekly time report. However, defendant represented at oral argument that some or all of the employees in those states are now using weekly time reports, although defendant did not specify which form of time report these employees are using.

The different versions of the weekly time reports have different "tenths" conversion charts. The one attached to McElmurry's declaration and to which plaintiffs narrow their notice request, has a place for the employee to record the employee's work start time, time out for lunch, time back in from lunch, and work end time. Exh. 1 to McElmurry Declr. It also provides for a daily total of hours worked, to be recorded in tenths. Id. The form instructs that "[e]mployees should record their In and Out times above. Time should be rounded to the nearest tenth of an hour." Id. The conversion chart provides that 0-5 minutes are recorded as "0"; 6-11 minutes are recorded as "0.1"; 12-17 minutes are recorded as "0.2"; 18-23 minutes are recorded as "0.3"; 24-29 minutes are recorded as "0.4"; 30-35 minutes are recorded as "0.5"; 36-41 minutes are recorded as "0.6"; 42-47 minutes are recorded as "0.7"; 48-53 minutes are recorded as "0.8"; and 54-59 minutes are recorded as "0.9." Id. If an employee follows these instructions and records their in and out time accurately, they round their time down to their detriment.

Another version of the weekly time report includes the same message about recording in and out times and rounding to the nearest tenth, but it contains no conversion chart. Exh. 1 to Kakiuchi Declr. at p. 1. Two others lack the "in and out time and rounding to the nearest tenth" message, but have conversion charts.

Id. at pp. 2, 3. On one, the conversion chart is the same as the one in the weekly time report attached to McElmurry's declaration. Id. at p. 3. The other, however, has a different conversion chart which provides: 1-6 minutes are recorded as "0.1"; 7-12 minutes are recorded as "0.2"; 13-18 minutes are recorded as "0.3"; 19-24 minutes are recorded as "0.4"; 25-30 minutes are recorded as "0.5"; 31-36 minutes are recorded as "0.6"; 37-42 minutes are recorded as "0.7"; 43-48 minutes are recorded as "0.8"; 49-54 minutes are recorded as "0.9"; and 55-59 minutes are recorded as "1.0." Exh. 1 at p. 2. This one also lacks the instruction in the "Daily Totals" column to list hours worked in tenths. Id. Rather, it instructs the employee to list the daily total of hours worked in hours and minutes. Id. Use of this form by an employee following the instructions may result in rounding up, rounding down, or no rounding at all.

In the last example provided in this record, the daily totals column has a column for hours worked which contains an asterisk. Id. at p. 4. The asterisk leads the employee to the "Rounding Rules" at the bottom right corner of the sheet. There, the employee is told: "Each day, calculate the total number of hours and minutes worked. Round the total to the nearest tenth of an hour using this chart, and enter the rounded total above." Id. The instruction continues: "For example, [based on the accompanying chart], enter 7 hours and 32 minutes as 7.5 hours; enter 7 hours and 58 minutes as 8.0 hours." Id. The conversion chart provides: 0-2 minutes are recorded as "0"; 3-8 minutes are recorded as "0.1"; 9-14 minutes are recorded as "0.2"; 15-20 minutes are recorded as "0.3"; 21-26 minutes are recorded as "0.4";

27-32 minutes are recorded as "0.5"; 33-38 minutes are recorded as "0.6"; 39-44 minutes are recorded as "0.7"; 45-50 minutes are recorded as "0.8"; 51-56 minutes are recorded as "0.9"; and 57-59 minutes are recorded as "1.0." Id. Using this form and following the instructions could result in rounding up, rounding down, or no rounding.

As can be seen from these exhibits, employees using the weekly time report attached to McElmurry's declaration who made no adjustment to the actual time they reported to work, left for lunch, returned from lunch, and left for the day and thus, only used the conversion chart to adjust their total daily hours worked, would end up either reporting their time accurately or rounding down. As defendant notes, however, given the instruction that employees are to record their in and out times and round time to the nearest tenth of an hour, some employees may employ the conversion chart not just to convert the daily total of hours worked, but also to the beginning, lunch out, lunch in, and work ending times. Thus, contrary to plaintiffs' contention that this particular weekly time report always results in a rounding down of an employee's time, it is clear that first, the employee's time could be straightforward and accurately reported with no rounding[3], and second, an employee could interpret the chart as requiring rounding of the start, lunch, and ending times and thus, could end

[3] For example, an employee who begins at 8:00 a.m., has lunch from 11:00 a.m. to 12:00 p.m. and ends at 5:00 p.m. would have worked eight total hours. The conversion chart would have the employee record this as 8.0 hours, an accurate report with no rounding up or down.

up rounding up[4]. I note this could result in rounding down for start, lunch, and ending times as well.

The other weekly time reports do not necessarily result in a consistent rounding down. In one, an employee working thirteen minutes gets to round up to 0.3 and one working fifty-five minutes gets to round up to 1.0. Exh. 1 to Kakiuchi Declr. at p. 2. In another, an employee working three minutes gets to round up to 0.1 and another working fifty-seven minutes gets to round up to 1.0. Id. at p. 4. In yet another, while employees are told to round to the nearest tenth of an hour, no conversion chart is provided, thus presumably leaving the conversion up to the employee's interpretation and judgment. Id. at p. 1.

Plaintiffs provide ample evidence that rounding down does occur using the weekly time report attached to McElmurry's

---

[4] For example, as defendant notes, an employee who reports to work at 8:05 a.m. could rely on the conversion chart showing that 0-5 minutes are to be recorded as "0," to record the start time as 8:00 a.m., thus rounding "up."

Plaintiffs contend that employees using this weekly time report do not round their start, lunch, and ending times, but rather use the conversion chart to round only the daily total hours worked. Accordingly, following plaintiffs' contention, rounding is always done downward in the bank's favor.

Plaintiffs' position is unavailing for two reasons. First, as demonstrated in the previous footnote, many employees' time will be accurately reported with no rounding at all. Second, plaintiffs ignore the express instruction, set off in a box, which tells employees to record their in and out times and round to the nearest tenth of an hour. While these are two separate sentences, the rounding instruction immediately follows the instruction to record in and out times and the instructions appear as the only instructions inside a box set off from any other instructions. While plaintiffs may have interpreted this instruction as applying only to the daily total hours worked, other employees may have reasonably interpreted the instruction differently.

declaration. The evidence in the record, however, does not support plaintiffs' contention that that particular time report always results in the rounding down of an employee's time worked. In addition to the examples given above, defendant provides evidence showing that of the forty-eight rounding down instances submitted by plaintiff, nine were either not rounded at all or were rounded up. Harumi Yamamoto Declr. at ¶ 2. And, twenty-three of the forty-eight who were underpaid one week were overpaid in other weeks. Id. at ¶ 6; Sandy Forrest Declr. at ¶ 1; Exh. 1 to Forrest Declr.

A rounding policy or practice that consistently resulted a rounding down of hours would likely violate the FLSA. But, the regulations clearly provide that rounding is not a per se violation of the law:

> this practice [referring to recording employees' starting and stopping time to the nearest five minutes, 1/10 of an hour, or quarter hour] of computing working time will be accepted provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.

29 C.F.R. 785.48(b). I have found no case indicating what "period of time" is to be considered in determining whether a rounding policy violates this regulation. In the only federal or state case I found interpreting this regulation, it is unclear how long the "period of time" at issue was.

In East v. Bullock's, Inc., 34 F. Supp. 2d 1176 (D. Ariz. 1998), the plaintiff had worked for the defendant just over three and one-half years, at least sixteen months of which she was paid by the hour. Id. at 1178. In addition to her other claims, she brought a claim under Arizona state law for failure to pay for all

hours worked. Id. at 1183. She cited twenty-eight examples of occasions when she was paid for less than the full time she worked. Id. at 1184.

The court noted that "[d]uring the same time period in which Plaintiff was 'underpaid,' her payroll records show[] that she was also 'overpaid.'" Id. Thus, the evidence showed that the defendant's "rounding system may not credit employees for all the time actually worked, but it also credits employees for time not actually worked." Id. Thus, the court found that the defendant's rounding practices "averaged out sufficiently to comply with § 785.48(b)." Id.

What the court failed to explain was the time period in which the alleged twenty-eight underpayments occurred. It is unclear from the opinion whether the sixteen months during which she was an hourly employee was the relevant time period, or whether something less than that comprised the "period of time" at issue. It is also unclear how often she was paid.

While I find no guidance in the case law, it seems reasonable to assume that for employees paid weekly, a period of at least several weeks, if not months, is appropriate. A lesser period would be incapable of producing the averaging of wages contemplated by the regulation.

Here, plaintiffs contend that they suffered a loss of overtime or minimum wages by using the weekly time report attached to McElmurry's declaration. To be similarly situated to plaintiffs, members of the putative class must also have suffered a similar loss. The problem with plaintiffs' argument that the rounding claims are suitable for collective action, is that to determine if

a putative plaintiff is similarly situated requires a very individualized inquiry and a review of thousands, if not tens of thousands, of individual time sheets.

As noted above, while a collective action is an "efficient mechanism" for resolving a number of similar disputes based on a common practice, "an action dominated by issues particular to individual plaintiffs can not be administered efficiently because individual issues predominate over collective concerns." Sheffield, 211 F.R.D. at 413.

Here, for a putative class member to be similarly situated to plaintiffs, meaning that the employee actually lost overtime or minimum wages as a result of using the particular weekly time report attached to McElmurry's declaration, the employee would need to be a non-exempt hourly employee who used the weekly time report at issue here, whose hours required rounding (in one or both of two ways) as opposed to straightforward reporting, whose interpretation of the conversion chart led them to round down, whose rounding down occurred consistently as opposed to sporadically, and who exclusively used the chart in this fashion over a "period of time" of at least weeks or months and did not use a different version of the weekly time report during the relevant "period of time."

This list of conditions shows that determining the putative class requires an exceptionally individualized inquiry. As in Sheffield, the evidence demonstrates that "each claim would require extensive consideration of individualized issues of liability and . . . [any collective action would be] mired in particularized determinations of liability . . . rather than collective consideration of common questions of law and fact." Id.; see also

Pfohl v. Farmers Ins. Group, No. CV03-3080 DT (RCX), 2004 WL 554834, at *7-10 (C.D. Cal. Mar. 1, 2004) (denying plaintiffs' motion for collective action certification under the FLSA when certain status of employees needed to be determined on an employee-by-employee basis).

While the burden at the initial stage of the conditional collective action certification process under the FLSA is not heavy, and plaintiffs do not need to make a showing of success on the merits of their claims (and I undertake no consideration of the merits at this time), plaintiffs nonetheless are obligated to show that they are similarly situated to the putative class. Here, plaintiffs have shown that the common facts between them and the putative class are limited to being non-exempt employees who used the challenged time sheet at some point during the relevant statute of limitations time period. But, as explained above, those common facts, by themselves, are insufficient to show that any given member of the putative class was harmed by the rounding policy as plaintiffs claim they were.

Plaintiffs fail to show a single course of action binding the putative class together. Rather, the similarly situated determination in terms of actual wage loss requires individual employee-by-employee, time sheet-by-time sheet inquiries which are inconsistent with a collective action's goal of promoting judicial efficiency. Accordingly, I recommend that plaintiff's motion for notice be denied.[5] Furthermore, given my recommendation, I

[5] I note that given the limitation of the notice request in plaintiffs' reply memorandum to the rounding class, I have not discussed the arguments relevant to the SSM claim or the late

recommend that plaintiff's request that the statute of limitations be tolled during the notice period, also be denied.

III. Defendant's Motions to Strike

Defendant moves to strike portions of the declarations filed by McElmurry, Gustafson, Bailey, Schuck, and Halliday, all filed by plaintiffs in support of their notice motion. Defendant also moves to strike Exhibit 1 to Schuck's declaration.

I deny the motions to strike as moot because even considering the challenged portions of the declarations and the challenged exhibit, I recommend that plaintiffs' motion for notice be denied. There is no need to consider the merits of defendant's arguments.

CONCLUSION

I recommend that defendant's Rule 12 motions (#13) be granted in part and denied in part and that plaintiffs' motion for notice (#4) be denied. I further recommend that defendant's motions to strike (#18, #40) be denied as moot.

SCHEDULING ORDER

The above Findings and Recommendation will be referred to a United States District Judge for review. Objections, if any, are due August 11, 2004. If no objections are filed, review of the Findings and Recommendation will go under advisement on that date.

/ / /

/ / /

/ / /

---

pay/termination claim. However, I note that my initial review of the arguments and the evidence leads me to believe that plaintiffs would encounter similar "individualized inquiry" problems in regard to the "similarly situated" requirement as to those putative class members.

If objections are filed, a response to the objections is due August 25, 2004, and the review of the Findings and Recommendation will go under advisement on that date.

IT IS SO ORDERED.

Dated this 27th day of July, 2004.

/s/ Dennis James Hubel
Dennis James Hubel
United States Magistrate Judge